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No. 510

IN THE

Supreme Court of the United States

October Term, 1958

JOHN SYRES and LOUIS J. WARRICK, *Petitioners*

v.

OIL WORKERS INTERNATIONAL UNION, LOCAL 23, ET AL., *Respondents*

REPLY OF RESPONDENT, GULF OIL CORPORATION

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Preliminary Statement

Although this Court has held that the complaint filed by the Petitioners in the court below stated a claim within the jurisdiction of the District Court,[1] the labor contract forming the basis of the suit was superseded by a new contract before the cause was reached for trial.

[1] Syres v. Oil Workers Int. Union, Local 23, 350 U.S. 892 (1955)

The Petitioners made no complaint about the new contract, although it had been in effect for more than six months. At the time of trial all that then remained of Petitioners' suit was a simple action for monetary damages, all claims for other relief having been dismissed with no complaint being made therefor.[2]

Thus, contrary to the assertions of Petitioners that this cause is "important because it involves the administration of the National Labor Relations Act,"[3] in truth and in fact there is no question presented concerning *any* Federal Statute. The only question preserved is one relating to the type of proof required in a class action for damages. As will be discussed hereinafter, this question of somewhat doubtful importance affects only the two individual petitioners and no others.

There is no question of the enforcement of an alleged racially discriminatory contract or any facet of racial discrimination before this Court in any form whatsoever.

Counter Statement of Questions Presented

Respondent Gulf does not agree that this case presents the questions stated by petitioners. The only issues in this case are:

1. Whether an erroneous instruction on the measure of damages is material when the verdict finds no liability.

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[2] R. 197; Opinion of Court of Appeals, App. B, p. 15; 257 F. 2d 479, 481.

[3] Petition for Certiorari, p. 4.

2. Whether in a class action monetary damages can be awarded to a class as a class when the individuals comprising such class have proved no loss or injury.

Reasons For Denying the Writ

A. A JURY VERDICT FOUND THAT THE RESPONDENTS WERE NOT LIABLE, AND THEREFORE, AN ERRONEOUS INSTRUCTION, IF ANY, ON THE MEASURE OF DAMAGES WAS HARMLESS.

The jury found under general instructions the general verdict of no liability. Alternative forms of verdict were placed in the jury's hands and the court properly instructed the jury that "if your verdict is for defendants you need not consider the question of damages or the cause any further." Pursuant to these instructions, the jury found:

"WE, THE JURY, find for the defendants."

Numerous authorities have stated that an erroneous instruction on the measure of damages is harmless where the verdict finds no liability.[4] The rule emerging from these authorities is epitomized in *Blanton*, supra:

> " . . . Since the jury found no liability whatever it is manifest that any inaccuracies affecting only the amount of damages was harmless."[5]

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[4] **Tracy v. Terminal Railroad Association of St. Louis**, 170 F. 2d 635 (8th Cir. 1948); **Gulf Refining Company v. Fetschan**, 130 F. 2d 129 (6th Cir. 1942), cert. denied, 318 U.S. 764 (1943); **Byrne v. Greene**, 70 F. 2d 137 (1st Cir. 1934); **Blanton v. Great Atlantic & Pacific Tea Co.**, 61 F. 2d 427 (5th Cir. 1932), cert. denied, 288 U.S. 609 (1933); **Carter v. Atlanta & St. A.B. Railway Co.**, 170 F. 2d 719 (5th Cir. 1948); 14 Cyc. of Federal Procedure, p. 453.

[5] **Blanton**, supra, fn. 4, 61 F. 2d at P. 429.

Having wholly failed to make any proof of damages to *any* individual and having an adverse jury verdict on ultimate liability, petitioners are without standing to complain here.

B. PETITIONERS' CONTENTION THAT ALLEGED DAMAGES TO INDIVIDUALS SHOULD BE AVERAGED IN A CLASS ACTION IS LEGALLY UNTENABLE.

There being "a total absence of proof that any particular individual had suffered any damage by reason of the alleged discriminatory provisions of the 1954 contract,"[6] petitioner now advances the novel theory that the damages are to the class and not to the individual.

The trial court's charge on the measure of damages correctly sets out the law applicable to suits, such as this, to protect rights of individuals. In such cases, the value of the challenged right determines the amount of damages that will be recoverable.[7]

In *Carroll*, supra, Judge Hand said, "In suits based upon deprivation of employment the amount in controversy seems to be limited to loss of wages." In the case at bar, the essence of the complaint is that because of the alleged racial discrimination Negroes have been deprived of certain promotional opportunities at the Respondent's Refinery. The monetary value of this promotional opportunity could only be the difference in the monetary value of the job held and that to which the employee would

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[6] **Syres, et al. v. Oil Workers International Union, et al.**, 257 F. 2d 479 (5th Cir. 1958), at page 483.

[7] **Carroll v. Somervell**, 116 F. 2d 918 (2d Cir. 1941); **Dermody v. Smith**, 88 F. Supp. 620 (D.C. Ind. 1949); **Dewar v. Brook**, 16 F. Supp. 636 (D.C. Nev. 1936).

have acceded but for the actions of the Respondents. Since all Negro employees continued working throughout the contract period, the amount of damages sustained by any individual employee can only be equivalent to an amount which represents the difference between his actual earnings on the existing job and the amount he would have earned had he been assigned a job for which he was qualified.[8]

Assuming that this is a proper subject for a class action under Federal Rule 23(a) because a common question of fact (the alleged conspiracy) was present, the damage to each individual composing the class was a separate and distinct demand for money damages, and his recovery depends solely on whether or not he could show that he was otherwise qualified for advancement. This is so because the employer's duty to pay wages for any job arises solely out of a contract between the individual and the employer; and conversely, the employee's right to such wage is derived from the same source. Cf. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 464 (1955). In this case Mr. Justice Reed ruled that a labor organization could not maintain on behalf of its members a suit under the National Labor Relations Act for *accrued* wages because such a cause of action lay with the individual employee. It necessarily follows that a claim for loss of potential *increased* wages belongs exclusively to the individual employee. The subject matter of this suit, reimbursement for potential lost wages,

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[8] **Columbian Insurance Co. v. Wheelwright**, 7 Wheat 534, 5 L. Ed. 516 (1822); **Carroll v. Somervell**, supra; Note 7, **Central of Georgia Railway Co. v. Jones**, 229 F. 2d 648 (5th Cir. 1956); **Lambrou v. Miner**, 36 F. Supp. 451 (N.D. Ill. 1940); **Cooney v. Legg**, 34 F. Supp. 531 (S.D. Calif. 1940).

if any, properly belongs to the individual employee. In this respect, his right is totally unrelated and independent of the claim of fellow Negro workers.

Petitioners seek to recover money damages with "a pro rata right of participation therein"[9] for all employees, including those who had suffered no damages. This flies in the teeth of all legal precedent.

C. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND ANY OTHER COURT OF APPEALS.

Petitioners, in attempting to justify issuance of certiorari, would have this court believe that the court below "has decided a federal question in a way which is in conflict with the decision of another Court of Appeals on the same matter."[10] The Petitioner mistakenly interprets the opinion of the Court of Appeals as holding that Rule 23, *Federal Rules of Civil Procedure*, is not applicable in a class action to recoup monetary damages for an alleged breach of a statutory duty imposed by the National Labor Relations Act.[11] Such a decision, says Petitioner, is in "direct conflict with a holding on the same issue in *Tunstall v. Brotherhood of Locomotive F. & E.* (CCA), 148 F. 2d 403." In truth, no conflict exists, for even a cursory reading of the *Tunstall* opinion reveals that the Court was concerned simply with a jurisdictional matter, that is, whether service of process upon individual members of a class against which class relief was sought was sufficient

[9] Petition for Certiorari, p. 9.

[10] Id., p. 6.

[11] Ibid.

to bring such class within the jurisdiction of the Court. On this point the Court said:

> " . . . We think that the suit here was unquestionably maintainable as a class suit and that there has been sufficient service upon representative members to give jurisdiction over the entire class constituting the Brotherhood."[12]

But no issue was made as to the representative status of the plaintiff Tunstall. Indeed, it was assumed that he was properly representing the class, and in the case at bar, neither of the respondents has ever contested the Petitioners' right to sue on behalf of other Negroes similarly situated, nor have any of the courts which have reviewed this case concerned themselves with the issue of whether or not this was a proper class suit. Certainly, Judge Rives' opinion cannot be taken as denying to the Petitioners the right to sue in such capacity. On the contrary, he assumes that the class action device is appropriate, when in his opinion he states "it is not enough to say that the right not to be discriminated against on account of race is joint or common, and that a class action is maintainable under Rule 23(a), *Federal Rules of Civil Procedure. Granted arguendo,* it nonetheless remains that *in such an action* the class can obtain only that relief to which it is entitled."[13] (Italics supplied). However, he quite clearly points out the proper procedure to follow in order to enable a court to award equal and exact justice:

> "Damages may sometimes be recovered in a class action, but where the damages, if recovered, would be

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[12] **Tunstall v. Brotherhood of Locomotive F. & E.**, 148 F. 2d 403 (4th Cir. 1945), at page 406.

[13] **Syres, et al. v. Oil Workers International Union**, 257 F. 2d 479 (5th Cir. 1958), at page 484.

in different amounts to separate individuals, the persons entitled thereto must be made parties or intervenors before the damages can be awarded."

Since each plaintiff's claim for damages was individual and several, and no specific property could be affected by the action, it was necessary that each individual assert his claim through intervention.[14] No individual made proof of any damages sustained; consequently, there could be no recovery.

This Court is committed to the proposition that "when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdiction amount."[15] In the language of Judge Rives: "Wages are, of course, separately and individually earned. Promotions and failures to promote are peculiar to the individual employee."[16] Under the provisions of Federal *Rule 23 (a)* the "right sought to be enforced for . . . the class is several" and each party seeking relief was required to establish his right thereto by affirmative evidence. Having made no such proof of damages, there can be no recovery by any petitioner.

Conclusion

The jury having resolved the basic fact issue of the alleged conspiracy against the Petitioners upon a fair charge against which no complaint is urged,[17] it is respectfully

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[14] **Schatte v. Int. Alliance of Theatrical Stage Employees, etc.**, 183 F. 2d 685, 687 (9th Cir. 1950), cert. den. 340 U.S. 827 (1950).

[15] **Pinel v. Pinel**, 240 U.S. 594, 596 (1916).

[16] **Syres v. Oil Workers International Union**, 257 F. 2d 479 (5th Cir. 1958), at p. 483.

[17] Charge: R. 770, et seq.; Verdict: R. 889.

submitted that the record would not have supported a monetary judgment for any petitioner.

WHEREFORE, premises considered, Respondent Gulf respectfully prays that the petition for the writ of certiorari be in all things denied.

Respectfully submitted,

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